IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE JURISDICTION

APPEAL FROM ORDER NO.830 OF 2005

Vishwanath Krishna Sakhare & anr . Appellants

vs

Chandrakant Govind Sakhare & ors .. Respondents

Mr.R.V.More for Petitioners

Mr.N.V.Bandiwadekar for Respondent no.2

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CORAM : B.H.MARLAPALLE, J

DATE: 19th September, 2005

P.C.

1. Heard Mr.More learned counsel for the appellants and Mr. Bandiwadekar for the learned counsel for the respondent no.2.

2. This appeal arises from the order dated 27th

July, 2005 passed by the learned Civil Judge, Sr.Division at Satara whereby the application at Exhibit 130 filed in S.C.Suit No.197 of 2000 came to be allowed and the defendant nos. 1 and 2 and the present appellants have been temporarily restrained from raising any construction and changing the nature of the suit property till disposal of the suit.

3. The suit properties as is described in para 5 of the plaint are agricultural lands, gavthan lands and constructed buildings at different locations and the suit has been filed for partition of all the suit properties. The plaintiff no. 1 is the father of the plaintiff no.2. The defendant no.1 is the son of the first plaintiff's deceased brother Krishna. The second defendant is the son of the first defendant whereas the third defendant is the wife of Krishna and mother of the first defendant. The plaintiffs' claim 1/2 share in the suit properties. The suit has been pending for about 5 years and the application at Exhibit 130 came to be filed on the ground that on the land located in revision survey No.296/A/1B the defendant nos. 1 and 2 had started taking steps

for development/construction. The application was opposed by the defendants by filing their say and in para 9 of the say it was stated that the second son of the defendant no.1 has passed Xth standard and some proposal was under consideration for development of the said land so as to provide some business venture for the second son. The learned Judge of the trial Court held that the plaintiff made out a prima facie case to issue temporary injunction order.

4. Mr.More learned counsel for the defendants during the course of hearing of this appeal submitted that on the land admeasuring 21 ares located in revision survey No.296/A/1B of village Padali in Koregaon Taluka the defendants proposed to open an MS/HSD Retail Outlet Dealership and therefore some construction activity is likely to commence on the said land. He submitted that the defendants are ready and willing to furnish an undertaking that they would compensate the plaintiff to the extent of their share with respect to this plot i.e. land admeasuring 21 ares in revision survey No.296/A/1B in case the plaintiffs succeeds in S.C.Suit No.197 of 2000. Such an

written undertaking is already placed on record and a copy of the same has already been served on the learned counsel for the plaintiff. Mr. More therefore prayed for variation of the impugned order to the extent of these suit properties namely land admeasuring 21 ares from revision survey No.296/A/1B of villale Padali in Koregaon of Satara district and on the basis of the undertaking. Mr. Bandiwadekar has opposed even such prayer for variation. He has referred to the averments made in the written statement as well as the Civil Application filed to the application filed at Exhibit 130 and submitted that the defendants are trying to make out a totally new case before this Court for the first time.

5. As noted earlier, the defendants in para 9 of their reply have stated that the second son of the defendant no.1 who is unemployed and some proposal to provide some employment opportunity was under consideration. As against this, Mr.More has now placed on record copy of the order passed by M/s Bharat Petroleum Corporation on 10th June, 2005. It is a letter of intent under the rural category to start a retail outlet dealership at Satara Road

in Koregaon Taluka and it is issued in favour of Mrs Madhwanti Sandesh Sakhare who is the wife of the defendant no.2. Though the defendants had filed their say to the application at Exhibit 130 on or about 4th July, 2005 they had not pleaded that the patch of lands in village Padali admeasuring 21 ares would be required for construction of the proposed retail outlet and/or storage. Mr. Bandiwadekar is therefore right in his submissions that this plea has been taken up for the first time in this appeal. There is no doubt that the allotment is made in favour of the wife of the defendant no.2 and the undertaking furnished by Mr. More could have been accepted provided such a plea was taken up before the trial Court. The failure on the part of the defendants to do so would require them to go back to the trial Court and apply for variation of the interim injunction order and also by furnishing an undertaking to compensate the plaintiffs proportionately in case they finally succeed in the pending suit.

6. In the premises, there is no case made out to disturb the order passed by the trial Court.

Therefore, the appeal is dismissed in limine. However, if the defendants apply to the trial Court for variation of the impugned injunction order in respect of the plot of land admeasuring 21 ares from revision survey No.296/A/1B from village Padali within a period of two weeks from today, the same shall be considered by the trial Court on its own merits and on the basis of the undertaking to be furnished by the defendants. The application shall be heard and decided as expeditiously as possible and in any case within a period of four weeks from its filing.

(B.H.Marlapalle, J)